JULY 2012
California Bar Examination

ESSAY QUESTIONS 1, 2, AND 3

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Pam and Patrick are residents of State A. While visiting State B, they were hit by a truck owned and operated by Corporation, a freight business.

Corporation is incorporated under the laws of Canada and has its headquarters there, where its President and Secretary are located. State B is the only state in which Corporation conducts its business. Corporation's drivers and other employees work out of its warehouse in State B.

Pam and Patrick jointly filed a lawsuit against Corporation in federal district court in State A. In their complaint, Pam demanded damages for personal injury in the amount of $70,000 and for property damage in the amount of $10,000; Patrick demanded damages in the amount of $6,000.

Corporation filed a motion to dismiss the complaint for lack of personal jurisdiction. The federal district court denied the motion. After trial, it entered judgment for Pam in the amount of $60,000 and for Patrick in the amount of $4,000.

Corporation has appealed on the grounds of lack of subject matter jurisdiction and lack of personal jurisdiction.

How should the court of appeals rule on each ground? Discuss.

Question 2

Wendy and Hal are married and live in California.

A year ago, Wendy told Hal that she would not tolerate his drinking any longer. She insisted that he move out of the family home and not return until he completed an alcohol treatment program. He moved out but did not obtain treatment.

Last month, Hal went on a drinking spree, started driving, and struck a pedestrian. When Wendy learned of the accident, she told Hal that she wanted a divorce.

Hal has consulted Lawyer about defending him in a civil action filed by the pedestrian. He is currently unemployed. His only asset is his interest in the family home, which he and Wendy purchased during their marriage. Lawyer offered to represent Hal if Hal were to give him a promissory note, secured by a lien on the family home, for his fees. Hal immediately accepted.

1. Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian? Discuss. Answer according to California law.

2. Is Wendy's interest in the family home subject to payment of Hal's legal fees? Discuss. Answer according to California Law.

3. What, if any, ethical violations has Lawyer committed? Discuss. Answer according to California and ABA authorities.

Question 3

Vicky was killed on a rainy night. The prosecution charged Dean, a business rival, with her murder. It alleged that, on the night in question, he hid in the bushes outside her home and shot her when she returned from work.

At Dean's trial in a California court, the prosecution called Whitney, Dean's wife, to testify. One week after the murder, Whitney had found out that Dean had been dating another woman and had moved out, stating the marriage was over. Still angry, Whitney was willing to testify against Dean. After Whitney was called to the stand, the court took a recess. During the recess, Dean and Whitney reconciled. Whitney decided not to testify against Dean. The trial recommenced and the prosecutor asked Whitney if she saw anything on Dean's shoes the night of the murder. When Whitney refused to answer, the court threatened to hold her in contempt. Reluctantly, Whitney testified that she saw mud on Dean's shoes.

The prosecution then called Ella, Dean's next-door neighbor. Ella testified that, on the night Vicky was killed, she was standing by an open window in her kitchen, which was about 20 feet from an open window in Dean's kitchen. She also testified that she saw Dean and Whitney and she heard Dean tell Whitney, "I just killed the gal who stole my biggest account." Dean and Whitney did not know that Ella overheard their conversation.

Dean called Fred, a friend, to testify. Fred testified that, on the day after Vicky was killed, he was having lunch in a coffee shop when he saw Hit, a well-known gangster, conversing at the next table with another gangster, Gus. Fred testified that he heard Gus ask Hit if he had "taken care of the assignment concerning Vicky," and that Hit then drew his index finger across his own throat.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Allow the prosecution to call Whitney? Discuss.

2. Admit the testimony of:
   - (a) Whitney? Discuss.
   - (b) Ella? Discuss.
   - (c) Fred? Discuss.

Answer according to California law.

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Performance Test A

INSTRUCTIONS AND FILE

In re CLEF, INC.

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IN re CLEF, INC.
INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

CRESPI, DONOHO and WAN, PA
9800 Commercial Boulevard
Suite 1000
Cooper City, Columbia 55155
CDWLaw@homepage.com

TO: Applicant
FROM: Luan Wan
RE: CLEF, Inc. – Corporate Governance Review

David Conway, a law school classmate, recently became the Chief Executive Officer (CEO) of the College Loan Equity Fund, Inc. (CLEF), a nonprofit corporation organized under the Columbia Nonprofit Corporation Act. As his first task, Conway is reviewing CLEF's corporate governance practices. He had become concerned about CLEF's practices in the course of interviewing for his new position. His concern has been heightened by a recent Columbia Supreme Court decision dissolving a high-profile nonprofit and by an even more recent announcement by the Columbia Attorney General of an intent to propose legislation to apply principles from the federal Sarbanes-Oxley Act to Columbia nonprofits. On behalf of CLEF, Conway has engaged our firm to conduct an analysis of certain aspects of the company's corporate governance procedures in light of the *Smith* case and the Attorney General's proposed legislation and, if warranted, suggest modifications to current practices.

Please prepare a memo that presents an objective analysis of whether the following actions violate Columbia law or the Attorney General's proposed requirements:

1. Engagement of an outside accountant;
2. Execution of a lease of corporate facilities;
3. Purchase of corporate insurance;
4. Guaranty of the mortgage of the former CEO; and
5. Failure to share an internal report with the Board of Directors and with loan fund investors.

Excerpt from CLEF's Web Site
http://www.CLEF.org/home/history

What is College Loan Equity Fund?

College Loan Equity Fund, better known as CLEF, is a nonprofit student loan program. The mission of other lenders is to generate equity for their shareholders; ours is to provide education financing to the broadest range of eligible undergraduate students. Our sole charge is to ensure that students have access to affordable funding for their education. We focus on the Humanist Group of colleges that constitute our membership and hundreds of non-member undergraduate schools.

Our History

CLEF, Inc. was formed by Melvin Metzger in 1997 and funded by a $10 million gift from the Metzger Family Foundation. CLEF's initial goal was to make low interest loans to needy undergraduate students who attended one of the 33 small, liberal arts colleges that make up the Humanist Group. These member colleges agreed to extend tuition and attendance discounts for students who qualified for CLEF loans.

CLEF is now a $5 billion nonprofit corporation with virtually all of its assets in the form of promissory notes on the loans it has made to thousands of undergraduate students. Although it has become the largest not-for-profit in the student loan field, CLEF's goal is still the same: to provide greater access to affordable undergraduate financing, and greater access to the information that can help students borrow wisely, manage debt responsibly, and repay their student loans successfully. And CLEF continues to make those below-market-rate loans to especially needy students who attend a Humanist Group college.

Interview: David Conway, ceo, CLEF, Inc.

LUAN WAN: David! It's great to see you. What's it been, eight years or so?

DAVID CONWAY: About that, Luan. It was our fifth law school reunion. I missed the tenth.

WAN: It's great to have you back in the area. Tell me about your new position with CLEF.

CONWAY: Well, it's a real opportunity. As you know, I took over as CEO after spending nine years with United American National Bank, initially as Associate General Counsel for its student loan division and then as VP of the division's operations. United American is one of the top lenders to undergraduate students, right behind Sallie Mae and CitiBank. CLEF, on the other hand, is the fastest growing lender in the undergraduate market and number one among the nonprofits in the field. Even so, with a shade over 100 employees, we're a small operation in comparison to the major players in the student loan industry.

WAN: What can we do to be of assistance? By the way, do you mind if we tape this session?

CONWAY: Of course not; go right ahead. As the new CEO I'm feeling my way around, poking into things to learn more about the company. When the Columbia Supreme Court came down with the *Smith* decision last month it caused me to review the operation of our Board of Directors. Then last week the Attorney General (AG) announced that he intended to propose legislation that will apply key principles of the federal Sarbanes-Oxley Act to Columbia nonprofits. I'm now worried that some of CLEF's long-time Board practices are out of sync with present Columbia law and the new regulations will be even tighter if, as is expected, the legislature adopts the AG's proposal.

WAN: Our firm does a lot of work for Columbia corporations so we have a good handle on local law. We don't do much with nonprofits but I know the Columbia Nonprofit Corporation Code tracks the State's for-profit corporate principles.

CONWAY: That's what I thought. It also makes sense for us to anticipate how current Board procedures fit with the Attorney General's efforts to extend key rules from the federal Sarbanes-Oxley law to Columbia nonprofits. As I see it, up-front planning is critical.

WAN: I thought that Sarbanes-Oxley only applies to for-profit public corporations?

CONWAY: You're correct; most SOX provisions are limited to for-profits. But the chatter among corporate counsel and the nonprofit community is about extending SOX 'best practices' to the nonprofit world.

WAN: SOX and 'best practices'?

CONWAY: Oh, sorry. SOX is short for Sarbanes-Oxley and 'best practices' means that the new federal governance and auditing rules have established a standard that many believe nonprofits should or will be forced to adopt. That appears to be the motivation of the Columbia AG — to prevent the possibility of an Enron-type scandal in the nonprofit sector by applying selected SOX principles.

WAN: OK, let's focus on your concerns about CLEF's existing Board practices. I read background info on the company's homepage so I know a bit more about CLEF and its operations. Pretty impressive — a $5 billion nonprofit company.

CONWAY: Yeah, it is amazing that CLEF began as a 'Mom and Pop' lender and has grown up to be a player in the tough student loan business. However, certain holdover governance practices from its small time roots are worrying me. For example, it's a strange Board of Directors. Of the 15 directors, five of them are effectively permanent. Although the company founder, Melvin Metzger, and four of his close personal and business friends technically serve three-year terms, they've been on the Board since the company was created about 15 years ago. With unlimited terms, they keep getting reelected by the corporation's members, the presidents of the Humanist colleges. Five directors come from the college financial aid community and the final five are college presidents, at least three of whom must be from the Humanist Group of colleges. The financial aid directors and the presidents serve single staggered terms of three years.

WAN: What's the problem?

CONWAY: Two things. First, there's a high turnover among the members who come from the academic community. The financial aspects of the student loan business are very complicated. There's a steep learning curve so by the time the financial aid types and the college presidents have caught on, they're rotating off the Board. This means they often defer to the five ‘permanent’ Board directors on key questions. Second, the Board composition means we don’t have any truly sophisticated financial types, no one from investment banking or the consumer credit field. These are serious handicaps in today’s complex and competitive student loan business.

WAN: Hmmm. I can see the problem.

CONWAY: I’m very concerned this will only get worse unless we do something. Even the most naive new director asks how much Directors and Officers Insurance we provide in case the directors get sued. But in a post-Enron environment, new directors with investment banking or other sophisticated experience in consumer finance certainly will insist on broader and more expensive coverage.

WAN: I see.

CONWAY: Deferral to the permanent directors and the lack of financial sophistication has led to what I believe are some questionable governance traditions at the Board level. For example, CLEF has used a local CPA firm, Metzger Associates, to conduct its financial oversight since the early days of the company.

WAN: Metzger Associates? Any relationship to…?

CONWAY: Yup, Sue Metzger, the principal in Metzger Associates, is Melvin’s first cousin. However, if we bring in a national accounting firm and conduct rigorous, in-depth SOX-type audits, it will cost the company twice what we pay Metzger.

WAN: Uh oh, that could create cost-control questions. Anything else?

CONWAY: Two years ago when CLEF added a loan servicing division the number of employees doubled, from about 50 to over 100. The company was forced to find larger quarters and it signed a long-term lease for a vacant department store that was remodeled to accommodate the expanded operations. Bernie Baugh, a member of the CLEF Board and Melvin Metzger’s college classmate, is a partner in Center City Realty, the company that owns the property and served as the general contractor for the renovation of the facilities.

WAN: Wasn’t that an issue in the *Smith* decision, questions about ‘insider’ transactions?

CONWAY: That’s one of the reasons I became nervous. In digging around, I also came across a recent internal report authored by the director of strategic planning that forecasts changes in the student loan market that could affect the company's liquidity. The report never was sent to the Board by my predecessor and it wasn't disclosed to potential investors in the last investment offering.

WAN: Can you provide me documentation of these incidents you just described?

CONWAY: I'll fax over a memo I've been working on that outlines what I've found so far. I'm still feeling my way and there may be more. I'd appreciate your analysis about how these actions jibe with Columbia law.

WAN: We'll get something back to you as quickly as possible.

CONWAY: Thanks. I also need your assistance in anticipating the impact of the Attorney General's sketchy proposal to apply some SOX-like rules on Columbia nonprofits. With $5 billion in assets and $150 million in annual revenue, CLEF is exactly the type of nonprofit that is the target of his legislation. Given the somewhat loose governance practices followed in the past, there's no question in my mind that CLEF needs to be alert to the likely stricter financial accountability standards the AG is proposing.

WAN: That seems to make sense, but why do you need us? You're an excellent lawyer and have years of experience in the for-profit student loan field with an organization that is subject to Sarbanes-Oxley. Why don't you review the AG's proposal and make your recommendations directly to the Board?

CONWAY: First, I'm the CEO and I shouldn't act as the company's legal advisor. And, frankly, the situation is fairly delicate. The company has been run like a family foundation pursuing its philanthropic mission. Melvin Metzger, the founder and Board chairman since the company's inception, is passionate about providing financial support to young people seeking an education. He had the financial resources to begin the nonprofit company and the business acumen to alter its operations several times to keep CLEF afloat and greatly expand its reach beyond the original group of students. Unfortunately, Melvin has a very proprietary attitude toward the Company and doesn't recognize that Board practices do not seem to have kept pace with CLEF's rapid transformation from a private foundation to a minor marketing company to a full-fledged financial institution that attracts major international investors and manages a significant loan portfolio. I am committed to making CLEF the model student loan company – profit or nonprofit – by adhering to the highest standards of Board governance and financial operations. But I have to be careful in communicating any criticism about current practices. Sound advice from a qualified objective source, such as your firm, will be better received by Melvin and the Board.

WAN: While I understand you're new and Metzger apparently is set in his ways, isn't it clear to everyone that avoiding potential liability is in the interest of the company and the Board? Assuming good faith on the part of the directors, how can they object to your call for high standards?

CONWAY: Well, the problem in transitioning the company to its new financial and business reality is cultural as much as anything. I'm worried about straining long-standing positive personal relationships among Board members.

WAN: OK, let me take a look at the Columbia Nonprofit Corporation Code, the *Smith* case handed down by the Supreme Court and the Attorney General's announcement about his intended legislative proposal before making any recommendations for you to take to the CLEF Board. You send me the memo you mentioned and we'll do our very best.

CONWAY: Thanks, Luan.

College Loan Equity Fund, Inc.
Affordable Funding for Undergraduate Education®
Box 2004 Cooper City, Columbia 55354

MEMO -- JULY 18, 2012

TO: Luan Wan, Crespi, Donoho & Wan, P.A.
FROM: David Conway, CEO
RE: CLEF Corporate Governance

As a follow-up to our conversation, the following is information I have gleaned from various CLEF sources. I have attached what I believe to be relevant excerpts from CLEF Board Minutes over the last six years (Attachment A) and the Executive Summary from an internal CLEF report prepared by our Director of Strategic Planning dated six months ago and prior to CLEF's most recent investment offering (Attachment B).

Audit and Financial Issues:

CLEF receives an annual accounting report from Metzger Associates but it doesn't conform to Generally Accepted Accounting Principles (GAAP standards) used by national accounting firms when performing traditional audits of many financial institutions. Although the accounting approach used by Metzger is common when reviewing small and medium size businesses, it does not go into the depth of analysis sophisticated financial institutions usually demand and expect, especially those who regularly seek significant funding from international investors. The Board doesn't have a separate audit committee. In fact, it functions as a committee of the whole for all of its work. For example, an informal executive committee, now composed of Melvin Metzger, Bernie Baugh and Jane Cross but not created by formal Board action, functions on behalf of the Board in the interim between the quarterly meetings.

As I mentioned when we met, CLEF doesn't have a well-balanced and diverse board with a lot of financial savvy. I am concerned the Board doesn't have the expertise to understand complex finance and macroeconomic projections, evaluate accounting recommendations and make generally sound financial decisions to fulfill its fiduciary responsibilities. CLEF's chief financial officer (CFO) leads a generally passive Board through all reviews of Metzger's accounting advice and the complex financial documents the Board has to approve for the annual investor offering process. The CLEF CFO and CEO are always present when Metzger presents any type of report to the Board.

Certification:

The only annual report of a financial nature generated by CLEF is IRS Form 990. Nonprofits under 501(c)(3) do not pay taxes but they must report revenue and expenditures (and any fundraising activity). CLEF's CEO signs off on this report but it doesn't come to the Board for review. My predecessor, Curtis Johnson, the former VP for Financial Aid at Bond College, knew financial aid and student loans but he didn't have an accounting or finance background.

Conflicts of Interest:

CLEF needs to adopt a conflict of interest policy with disclosure standards to guide the board and staff in independent decision-making. Given several of the transactions of the CLEF Board memorialized in the attached Minutes, this is an area about which I have great concern and seek your advice and guidance.

Attachment A
Excerpts from CLEF Board Minutes

October 5, 2011:

Mr. Morgan moved and Ms. Gilmore seconded the reappointment of Metzger Associates as CLEF's certified public accountants. Mr. Morgan noted that this would be the 13th year CLEF has used Metzger Associates as its accounting firm. He mentioned that literally and figuratively Sue Metzger, the cousin of Board Chair Metzger, is a long-standing member of "the CLEF family" and she understands the Company's culture and goals. The motion was adopted unanimously without discussion.

April 14, 2009:

The Board discussed the need to build or lease new facilities to accommodate the expected growth in employees due to the impending creation of a loan servicing division. The CEO and the Board Chairman reported their judgment that the vacant Pomeroy's Department Store in West Cooper City was ideal. With 80,000 square feet and a large parking lot, the property will meet short and long-term projected needs for space. CLEF has been offered $10 per square foot in annual rent for a ten-year term with an option to purchase the property or renew the lease for an additional five years. Renovation estimates run between $800,000 and $1 million, including all furniture. Ms. Metzger from Metzger Associates reported that these figures were within the facilities budget earlier adopted by the Board. On the motion of Ms. Cross, seconded by Mr. Baugh, the Board unanimously (1) approved the lease with Center City Realty; and (2) approved engaging Center City Realty's construction division to serve as the general contractor for the necessary renovations.

October 19, 2007:

The Board took up the matter of the appointment of Curtis Johnson, the VP for Financial Aid at Bond College, as CLEF's CEO for a term of five years. Board Chairman Metzger reported that negotiations were almost complete. One issue remaining was Johnson's need for a mortgage in the amount of $420,000 to purchase a house in Cooper City. Board member Anthony Niedwicki, Executive Vice President of Cooper City Savings, indicated that his bank would make the loan if CLEF would sign as a guarantor. On the motion of Ms. Gilmore, seconded by Mr. Morgan, the Board agreed to guaranty Mr. Johnson's mortgage.

June 15, 2006:

The Board discussed the rising costs associated with various insurance policies required to operate the business. Mr. Metzger reported it would cost almost $95,000 to renew the insurance package with Intercontinental Insurers for the next fiscal year. Board member John Morgan, a principal in the Cooper City Insurance Consortium, stated he could provide the company with identical coverage at a price at least 10-percent below that quoted for renewal. The Board adopted Ms. Maurer's motion to purchase the necessary insurance from the Cooper City Insurance Consortium.

Attachment B
Excerpt from CLEF Internal Report:

January 21, 2012

TO: Senior Management
FROM: Wendy Sims, Director of Strategic Planning
SUBJECT: Challenges to CLEF's Cash Flow

Executive Summary: Combining the Chief Financial Officer's most recent Company projections and my analysis of the U.S. business climate and college enrollment, I perceive two obstacles to CLEF's short and long-term revenue estimates. First, continued weakness in the white-collar job market nationwide means that fewer college graduates are being employed in high salaried positions. Accepting lower paying jobs means that some graduates will earn less and will have greater difficulty in servicing their loans. Based on CLEF's accumulated data, I estimate that our student loan defaults will slowly rise from six to thirteen percent of the annual loan volume. Complicating the consideration of cash flow is the sharp rise in college graduates entering professional and graduate schools. Medicine, dentistry, law and business are experiencing record applications. A significant shift by college graduates away from the work force and into postgraduate study will mean that undergraduate loans will be deferred for the duration of graduate work. This is likely to result in a dip in CLEF's expected revenue for up to four years. Such a change in revenue may negatively affect our ability to attract investors in our next offering.

JULY 2012
California Bar Examination

Performance Test A

LIBRARY

In re CLEF, Inc.

LIBRARY

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Selected Provisions of Columbia Nonprofit Corporation Code

§ 4830. Performance of Duties by Director of a Nonprofit Corporation; Liability

(1) A director shall perform the duties of a director in good faith, in a manner such director believes to be in the best interests of the nonprofit corporation and its members and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(2) So long as a director acts in good faith, after reasonable inquiry when the need is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the following:

(a) Officers or employees of the corporation the director believes to be reliable and competent in the matters presented;

(b) Counsel, independent accountants or other persons as to matters the director believes to be within such person's professional or expert competence; or

(c) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence.

(3) A person who performs the duties of a director in accordance with subdivisions (1) and (2) shall have no liability based upon any alleged failure to discharge the person's obligations as a director.

§ 4832. Conflict of Interest Transactions

(1) A conflict of interest transaction is a transaction with the corporation in which a director or officer of the corporation has a direct or indirect interest.

(2) A director or officer has a conflict of interest if, but not only if, another entity in which the director or officer has a material interest is a party to the transaction or another entity of which the director or officer is a director, officer, or trustee is a party to the transaction.

(3) Any conflict of interest transaction is voidable by the corporation, and may be the basis for liability of a director or officer, unless the transaction was fair at the time it was entered into or is approved in accordance with subdivision (4).

(4) A conflict of interest transaction may be approved if:

(a) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board of directors or a committee consisting entirely of members of the board of directors and the board of directors or such committee authorized, approved, or ratified the transaction;

(b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the members and they authorized, approved, or ratified the transaction; or

(c) Approval is obtained from:

(i) The attorney general; or

(ii) A court of record having equity jurisdiction in an action in which the attorney general is joined as a party.

(d) Approval by the board requires the affirmative vote of a majority of the directors who have no direct or indirect interest in the transaction, but no such transaction may be approved by a single member of the board.

(e) Approval meeting the requirements of subdivisions (c) and (d) removes the voidability of the transaction by the corporation and personal liability for directors and officers, but directors so approving must comply with their fiduciary duties in deciding whether to approve.

(f) A director who votes for, assents to or ratifies a transaction made in violation of the Nonprofit Corporation Code and does not comply with standards of conduct established in § 4830 is personally liable to the corporation.

SMITH v. COLUMBIA CHILDREN & FAMILY SERVICES, INC.
Columbia Supreme Court (2012)

The Attorney General filed suit pursuant to Columbia Nonprofit Corporation Code ("Code") to dissolve a nonprofit corporation, Columbia Children and Family Services, Inc. (CCFS). The trial court granted summary judgment for the Attorney General, finding that CCFS had abandoned its charitable purpose and devoted itself to private purposes, and ordered the appointment of a receiver to preserve the remaining corporate assets. CCFS appealed.

The Attorney General maintained that CCFS, a nonprofit, tax-exempt corporation, repeatedly violated the Columbia Nonprofit Corporation Code by: (1) renting property owned by Emily Madison, the sometimes executive director and chairperson of the CCFS board of directors; (2) investing CCFS funds in a local bank in which board members had an interest; and (3) approving transactions that inured to the benefit of the board chairperson and her family and friends.

CCFS's charter of incorporation lists as its purpose: "to provide comprehensive social service for young people who are teenage mothers, handicapped children, underachievers in school and special-problem children." As a nonprofit corporation, CCFS is authorized "to seek public and private funds" to achieve its goals. As it turns out, the Columbia Department of Human Services (DHS) provided almost all of CCFS's funds.[1]

In general terms, a nonprofit is an organization in which no part of the income is distributable to its members, directors or officers. A nonprofit corporation is not prohibited from conducting enterprises for income or from accumulating earnings. However, such revenues must be used for the purposes set forth in the charter. No pecuniary gain can inure to directors or officers and there can be no direct or indirect

[1] According to the trial court's finding, more than ninety-nine percent of CCFS's revenue came from DHS. In the three years preceding the Attorney General's action, DHS provided the company with $3.1 million in 2007; $6.8 million in 2008; and $4.9 million in 2009.

distribution of income or profits to them. For example, under § 4858 of the Code, nonprofits are specifically prohibited from lending money to, or guaranteeing the obligation of, a director or officer of the corporation. The bargain made with the government, the taxpayers, and the public in return for benefits such as tax exemption is that the nonprofit will operate for the public good and not for the enrichment of those running it.

Directors and officers of nonprofits, like their for-profit counterparts, owe two basic fiduciary duties to the corporation: the duty of care and the duty of loyalty.

The duty of care imposed on corporate nonprofit directors by the Code constitutes a mandate that directors must in appropriate circumstances make such reasonable inquiry as ordinary prudent persons would make under similar conditions and directors may not close their eyes to what is going on about them.

Because the missions of for-profit and nonprofit corporations are different, the duty of loyalty is defined somewhat differently. The officers and directors of a for-profit entity are guided by their duty to maximize long-term profit for the benefit of the corporation and the shareholders. A nonprofit's reason for existence, however, is not to generate a profit. Thus, a director's duty of loyalty lies in pursuing or ensuring pursuit of the public or charitable purpose that is the corporation's mission.

As part of the duties of care and loyalty, certain transactions, called conflict of interest transactions, between the company and a director or officer are subject to close scrutiny. A conflict of interest transaction is defined as a transaction with the corporation in which a director or officer of the corporation has a direct or indirect interest. A director or officer has such an interest if, for example, another entity in which the director or officer has a material interest is a party to the transaction or another entity of which the director or officer is a director or officer is a party to the transaction. A conflict of interest transaction is voidable by the corporation, and may be the basis for liability of a director or officer, unless the transaction was fair at the time it was entered into or is approved in accordance with Code § 4832 (4):

"A conflict of interest transaction may be approved if:

(a) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board of directors and the board of directors authorized, approved, or ratified the transaction;[2] or

(b) Approval is obtained from:

(i) The attorney general; or

(ii) A court of record having equity jurisdiction in an action in which the attorney general is joined as a party."

Code § 4832 also provides that a director who votes for, assents to or ratifies a transaction made in violation of the nonprofit corporation statutes and does not comply with standards of conduct established in § 4830 is personally liable to the corporation. Where corporate officers and directors, contrary to their fiduciary duties, do not advance the nonprofit corporation's goals, protect its assets, and ensure that its resources are used to achieve the corporation's purposes, other remedies exist. For example, Code § 4831(a)(2) authorizes dissolution of a nonprofit corporation in a proceeding brought by a percentage of voting members upon proof of one of several grounds, including where "the corporate assets are being wasted or misapplied" or where "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent."

Columbia has long recognized the right of members of a nonprofit corporation to bring the equivalent of a shareholder derivative action against the directors and officers for wasting corporate assets and using corporate assets for personal gain. In *Bourne v. Williams* (Col. Ct. App. 1981), the court held "that members of nonprofit corporations have the same rights in this regard as stockholders of corporations for profit." This right, however, is not effective where, as here, a nonprofit corporation has no members. Consequently, statutory authority has been given to the Attorney General to act in the public good in enforcing the requirements applicable to nonprofit corporations. The

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[2] Under the Revised Model Nonprofit Corporation Act, the approval by the disinterested, informed board of directors of a nonprofit corporation must be made in advance of the transaction. However, Columbia did not adopt the "in advance" language.

rationale for the statutory authority is that nonprofit corporations, which usually have no participants with a sufficient economic interest to assure oversight, can only be made accountable for their use of assets if there are broad powers of regulation in a state officer. In addition to the provision authorizing an action to dissolve a nonprofit corporation, pursuant to Code § 4811, the Attorney General may bring an action to remove a director who is "engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation."

Thus, the Attorney General, acting in the public interest, has authority to seek dissolution of a nonprofit corporation that fails to devote its assets to a public, rather than a private interest. Where such a corporation is operated for the private benefit of an individual in contravention of the principles governing nonprofit status, or where the corporation has abandoned its public or charitable purpose, action by the Attorney General and the courts is warranted.

The trial court correctly recognized the central issue in this case: whether CCFS complied with the requirements that a nonprofit corporation fulfill a nonprofit purpose and not be operated for private financial gain. To the extent CCFS was operated for private gain, its assets were misapplied. Thus, the question is whether the undisputed facts demonstrate that CCFS was operated for the private benefit of Ms. Madison, her family, or other corporate insiders.

The Undisputed Facts

Our review of the record leads to the inescapable conclusion that this “nonprofit” was operated for the private gain of Ms. Madison, her family, and other individuals in control of the corporation. The facts demonstrate a consistent pattern of disregard of CCFS as a separate entity from Ms. Madison and of the fundamental nature of a nonprofit corporation.

Even based on the figures provided by the corporation, although they are not entirely reconcilable, Ms. Madison not only was paid a substantial salary, but also was regularly awarded bonuses of 50% or more of that salary. Corporate records and corporate memory are ambiguous about the exact amounts so paid, although it is clear several $50,000 bonuses were awarded to her. The corporation's inexact records on this issue simply demonstrate the inattention paid to distributions to Ms. Madison. Although the board attempts to justify her salary and the large bonuses as merited by the success of the program, including the financial success, that argument misses the point. The goal of a nonprofit corporation is not to generate profit; neither is it to reduce its "profit" or excess revenues by increasing operating expenses that enrich corporate insiders. Excess revenue is to be used to further the public or charitable mission of the corporation. We do not imply that a nonprofit corporation cannot reward its officers or board members with salary increases or other compensation if that compensation is reasonable. Although CCFS argues vehemently that it proved that Ms. Madison's salary was reasonable, we find no evidence to support an argument that regular yearly grants of additional compensation of 50% or more of her salary was reasonable. In any event, it is not a question of whether any particular amount was proven to be reasonable or unreasonable. Rather, the cavalier manner in which the corporate board regularly gave its creator, acting executive director and sometime board chair significant "additional compensation" demonstrates to us that CCFS's assets were treated as a ready source of economic benefit to an individual.

Another example of the manner in which the corporate resources were used involves payment for personal expenses. Ms. Madison freely used corporate funds for personal expenses for herself and her family, such as travel to London and Hawaii. In those instances, no one in the corporation apparently questioned the original payment of the expenses by the corporation, and the corporation was never repaid, even though there is no dispute that the trips had no business purpose.

The use of nonprofit corporate revenue for private gain is dramatically exemplified in the real estate and leasing transactions. Twice Ms. Madison informed the board that CCFS needed additional space, then purchased real property meeting that need, and leased that real property to the corporation. She made the second purchase of property later leased to the corporation shortly after CCFS paid her $437,000 in "prorated back rent" on the initial leased property. The “back rent” was based on an inflated number of square feet at a higher rate per square foot than CCFS originally had contracted to pay and after the rate per square foot had already been increased during the term of the lease. Members of the board who approved this payment were unable to explain how this payment could have been in the corporation's interest.

The leasing by the corporation of space owned by Ms. Madison raises significant questions because the record does not indicate any attempt by the board to inquire about other space or compare rental amounts or ascertain Madison’s interest in the properties. The increases in rent during the terms of the leases are difficult to justify as being in the interest of CCFS and are totally unjustified in the record before us. Even these decisions, however, pale in comparison to the remarkable act of giving Ms. Madison $437,000 on the basis of "prorated back rent" for which the corporation was clearly not liable. There is no better example of the total disregard exhibited toward the interests of CCFS and the furtherance of its public benefit mission.

The investment of substantial sums in a bank in which Ms. Madison, her family, and a CCFS board member had significant financial interest, and on whose board Ms. Madison and the board member sat, also demonstrates a disregard of the requirements for such transactions. The requirements exist to protect the nonprofit corporation's assets and to avoid insider economic benefit. Once again, those in control of CCFS abandoned their duty to see that these assets were used to further the corporation’s public benefit mission.[3]

These circumstances as well as others demonstrate a failure of those in control of CCFS to ensure adherence to the basic requirement of a nonprofit entity: that it be operated exclusively to serve public rather than private interests, and that its income or

[3] One board member testified he saw nothing wrong with such transactions: “If board members were giving their time serving as volunteers, I think it would be unkind if they had a business and you needed something they had and then not to purchase from them.”

assets not be distributed to individuals in control of the entity. CCFS fails the test of whether it was operated as a true nonprofit corporation. The trial court determined that the corporation had abandoned any public or charitable purposes and had pursued private interests. Our independent review of the record fully supports that conclusion.

Business Judgment Rule as a Defense

CCFS argues that the directors' judgment with respect to the challenged financial transactions was insulated from "second-guessing" by the “business judgment rule.” Essentially, the corporation argues that decisions by the Board regarding compensation, payment of expenses, investment and leasing are committed to the sound discretion of the board and should not be reviewed by the courts.

Columbia courts, recognizing the business judgment rule in certain circumstances, have followed a noninterventionist policy with regard to most internal corporate matters and have acknowledged that directors have broad management discretion. Where it applies, the business judgment rule is a presumption that corporate directors, when making a business decision, act on an informed basis, in good faith, and with the honest belief that their decision is in the corporation's best interest. The rule does not apply, however, when the director or officer has an interest in the decision, did not actually make a decision, or made an uninformed decision. Based on these criteria, the Attorney General has argued that the actions by the CCFS board in approving various challenged transactions do not qualify for the protection of the business judgment rule.

The rule does not apply to decisions that breach the duty of loyalty. The business judgment rule was developed by the courts concurrently with the duty of care to protect corporate management from liability for mistakes in business judgment. Thus, the duty of care is implicated, not the duty of loyalty. Simply stated, the business judgment rule holds that directors and officers are not liable for honest mistakes or negligent judgment. Directors and officers incur liability only for gross negligence and are not liable simply because their decisions result in an unfavorable outcome for the corporation. Developed to analyze duty of care issues, the business judgment rule is no shelter for directors and officers who breach the duty of loyalty. As explained earlier, a director's duty to ensure that a nonprofit corporation operates to further its public purpose is part of the duty of loyalty.

The business judgment rule is a potential defense in two situations: (1) where officers or directors face personal liability; and (2) where the corporation (generally in a derivative action) seeks to void a decision of or transaction approved by the board. Neither situation is present here. The Attorney General does not seek monetary damages from any member of the board for breach of fiduciary duties. Neither does he seek to set aside or invalidate any particular transaction. Instead, this action is maintained under the Code provision that authorizes the Attorney General to act in the public interest to ensure that a nonprofit corporation is not operated for private gain. Although the business judgment rule is applicable to nonprofit corporations, it has no application to this case. While the rule reflects a sound judicial policy of declining to substitute a court's judgment for that of a corporation's directors when they have acted in good faith and in furtherance of corporate purposes, that policy has no application to CCFS when it abandoned its purpose and pursued private, rather than public, interests.

Conclusion

After careful consideration of the record, we have determined that the trial court was correct in granting summary judgment for the Attorney General, appointing a receiver, and ordering the dissolution of CCFS. Therefore, we affirm the decision of the trial court and remand the case for further proceedings consistent with this opinion.

Office of the Attorney General of Columbia
NEWS RELEASE NO. 16-2012, JULY 12
ATTORNEY GENERAL ANNOUNCES INTENT TO PROPOSE COLUMBIA NONPROFIT CORPORATION LEGISLATION

Springfield — Attorney General of Columbia Michael Allen O'Pake today announced his intent to propose legislation relating to Columbia nonprofit corporations.

Background

The American Competitiveness and Corporate Accountability Act of 2002, commonly known as the Sarbanes-Oxley Act, was passed by Congress in response to the corporate and accounting scandals of Enron, World Com, Arthur Andersen, and others. The law, whose purpose is to rebuild public trust in America's corporate sector, requires that publicly traded companies adhere to new governance standards that increase board members' roles in overseeing financial transactions and auditing procedures.

Virtually untouched by Sarbanes-Oxley is the fastest growing sector of the corporate culture, the nonprofit corporation. Explosive growth of the nonprofit sector along with significant expansion into commercial activities have transformed the typical not-for-profit from a charity managing a modest perpetual fund into a modern enterprise subject to the management demands and market forces of a complex business. Columbia, home to thousands of nonprofits, has more than 3,500 with annual revenue in excess of $1 million. The revenue sources of Columbia nonprofits in 2008 were 48% fees and charges, 34% philanthropy, and 18% public funds.

Nonprofits account for a significant portion of the Columbia economy and many of our citizens are dependent on these public mutual benefit organizations. Maintaining the financial strength of these corporations is critical to the State. Financial integrity is essential to the financial soundness of nonprofits. Critch Rating recently wrote, "Nonprofit companies found to have exceptionally weak corporate governance or disclosure practices could face a downgrade in their tax-exempt bond rating or other negative financial rating action, while those with very strong practices might warrant a special or favorable mention in the credit analysis."

Key Provisions

The Columbia Nonprofit Accountability Act is a comprehensive plan for nonprofits with $3 million in assets or $1 million in gross revenue per year. The legislation addresses the certification of financial information; the creation of executive and audit committees; and controls on business transactions with directors and officers.

Certification of Financial Information

The key officers of affected nonprofits (the CEO and CFO) will be required to verify the annual report and related documents. In addition to certifying the financial report is fairly presented, these officers must verify that there are no material omissions or misstatements in the annual report; that they personally have reviewed the nonprofit's internal controls and found them effective; and that any concerns about misstatements, fraud or the internal controls have been disclosed to the nonprofit's audit committee and the external auditors.

Executive and Audit Committees

A nonprofit corporation with a board of directors consisting of 15 or more members will be required to establish an executive committee consisting of at least three directors to facilitate the exercise of effective board oversight.

The required audit committee will be directly responsible for appointment, compensation and oversight of the nonprofit's external and independent accountant who will prepare the annual audit and related financial reports. The audit committee also will be required to establish procedures to receive and review complaints about financial and related affairs, including anonymous complaints from the staff of the nonprofit corporation. The audit committee must include at least one independent director with financial expertise. The audit committee must meet annually with the external and independent auditor outside the presence of the nonprofit corporation's officers. Finally, the lead partner of the company's auditing firm must be changed at least every five years.

Each member of a nonprofit corporation's audit committee will be required to be an "independent" director. Independence will be defined as not being a member of management and not receiving compensation from the company as a consultant for other professional services (although service on the board may be compensated). A company also will be required to disclose if it has a "financial expert" on the audit committee. If the committee does not have such an expert the company must provide an explanation for its decision. While a company's directors have the right to establish specific qualifications for a "financial expert," the Act will set forth that a company should look to an individual's education and experience as a public accountant, auditor, or principal accounting officer. Key responsibilities of the audit committee are direct control of hiring, setting the compensation for and overseeing the activities of the company's outside auditing firm.

Business Transactions with Directors and Officers

Current Columbia law allows nonprofit corporations to enter into business or financial transactions with directors or officers as long as the transactions are fair and reasonable to the company. Such transactions still will be permitted. However, the Attorney General will have express authority to challenge such transactions, and the burden will be on the corporation to establish fairness and reasonableness based on several factors, including cost and the quality of the services or products being provided.

This rule will apply to transactions with individual directors and officers and to transactions with any entity if a director or officer of the nonprofit corporation is also a director or officer of the other entity. Any director who approves a transaction that is determined not to be fair and reasonable, as well as the director or officer who enters into the transaction with the corporation, will be subject to financial penalties.

A transaction will be presumed to be fair and reasonable if (1) it is approved in advance by the board of directors; (2) all terms of the deal are disclosed to the board in advance; (3) comparability data is obtained and relied upon; and (4) the basis for the board's decision is documented.

For more information, please contact Gary Dimmick at 555.659.5959.

- # -

JULY 2012
California Bar Examination

ESSAY QUESTIONS 4, 5, AND 6

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

Peter responded to an advertisement placed by Della, a dentist, seeking a dental hygienist. After an interview, Della offered Peter the job and said she would either: (1) pay him $50,000 per year; or (2) pay him $40,000 per year and agree to convey to him a parcel of land, worth about $50,000, if he would agree to work for her for three consecutive years. Peter accepted the offer and said, “I’d like to go with the second option, but I would like a commitment for an additional three years after the first three.” Della said, “Good, I’d like you to start next week.”

After Peter started work, Della handed him a letter she had signed which stated only that he had agreed to work as a dental hygienist at a salary of $40,000 per year.

After Peter had worked for two years and nine months, Della decided that she would sell the parcel of land and not convey it to him. Even though she had always been satisfied with his work, she fired him.

What rights does Peter have and what remedies might he obtain as to employment and the parcel of land? Discuss.

Question 5

In 2004, Mae, a widow, executed a valid will, intentionally leaving out her daughter, Dot, and giving 50 per cent of her estate to her son, Sam, and 50 per cent to Church.

In 2008, after a serious disagreement with Sam, Mae announced that she was revoking her will, and then tore it in half in the presence of both Sam and Dot.

In 2010, after repeated requests by Sam, Mae handwrote and signed a document declaring that she was thereby reviving her will. She attached all of the torn pages of the will to the document. At the time she signed the document, she was entirely dependent on Sam for food and shelter and companionship, and had not been allowed by Sam to see or speak to anyone for months. By this time, Church had gone out of existence.

In 2011, Mae died. Her sole survivors are Dot and Sam.

What rights, if any, do Dot and Sam have in Mae's estate? Discuss.

Answer according to California law.

Question 6

Dan worked at a church. One day a woman came to the church, told Dan she wanted to donate some property to the church, and handed him an old book and a handgun.

Dan had originally intended to deliver both the book and the gun to the church's administrators, but he changed his mind and delivered only the book. He put the gun on the front seat of his car.

The next day, as he was driving, Dan was stopped by a police officer at a sobriety checkpoint at which officers stopped all cars and asked their drivers to exit briefly before going on their way. The police officer explained the procedure and asked, "Would you please exit the vehicle?"

Believing he had no choice, Dan said, "Okay."

After Dan got out of his car, the police officer observed the gun on the front seat and asked Dan if he was the owner. Dan answered, "No. I stole the gun. But I was planning to give it back."

Dan is charged with theft and moves to suppress the gun and his statement to the police officer under the Fourth Amendment to the United States Constitution and Miranda v. Arizona.

1. Is Dan likely to prevail on his motion? Discuss.

2. If Dan does not prevail on his motion, is he likely to be convicted at trial? Discuss.

July 2012
California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

FLORES v. FALK

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FLORES v. FALK
INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Acri and Adams

Methuselah, Columbia

To: Applicant

From: Armond Acri

Date: July 26, 2012

Re: Dalia Flores v. Gary A. Falk

We have filed a legal malpractice action against attorney Gary Falk on behalf of our client Dalia Flores. Falk has filed a demurrer, claiming that the complaint fails to state a cause of action because Dalia was not his client and thus he owed her no duty.

Dalia's mother, María, had requested that Falk prepare a deed making Dalia the joint tenant in María's house. The deed was prepared by Falk and signed by María, but Falk did not record the deed for almost a year. María died before the deed was recorded. Dalia's brother challenged the validity of the deed in the probate of María's estate.

At the conclusion of the probate court proceeding, the court issued a tentative ruling, concluding that the circumstances did not establish that María had an immediate intent to convey the house to Dalia. Falk's failure to record the deed did not itself invalidate the deed. The probate court, however, concluded that Falk did not record the deed because Falk had doubts about Maria's intention to convey title to Dalia.

After the tentative ruling, we settled to avoid a final adverse decision on the merits, and there is no issue of collateral estoppel or issue preclusion. In the settlement, Dalia dropped her claim to exclusive title to the house, but was allowed to stay in the house for two years.

In this case we claim that Falk's professional negligence forced Dalia into settling the case and losing the property.

Please prepare our proposed memorandum of points and authorities in opposition to the demurrer following our attached guidelines. In anticipation of a demurrer, we incorporated into the complaint all the facts indicating professional malpractice. We have nothing to add. Thus, do not argue that we should be given leave to amend the complaint in order to make additional allegations.

LAW OFFICES OF ACRI AND ADAMS

TO: Attorneys

RE: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to attorneys all persuasive briefs or memoranda such as memoranda of points and authorities to be filed in state court shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated briefly, cogently, and accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position.

Following the Statement of Facts, the Argument should begin. This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, IMPROPER: Defendant had sufficient minimum contacts to establish personal jurisdiction. PROPER: A radio station located in the state of Franklin that broadcasts into the state of Columbia, receives revenue from advertisers located in the state of Columbia, and holds its annual meeting in the state of Columbia, has sufficient minimum contacts to allow Columbia courts to assert personal jurisdiction.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Associates should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

SUPERIOR COURT OF THE STATE OF COLUMBIA

FOR THE COUNTY OF ANGELES

Case No. 88888

DALIA FLORES, Plaintiff,	COMPLAINT FOR
vs.	LEGAL MALPRACTICE
GARY A. FALK, Defendant	

Plaintiff Dalia Flores alleges for cause of action against Defendant as follows:

1. Plaintiff is a resident of the County of Angeles, and the daughter of María Flores, deceased.

2. Defendant Gary A. Falk is and was an attorney licensed to practice law in Columbia and was practicing law in Angeles County, Columbia.

3. On or about October 1, 2007, Defendant was employed by María Flores to prepare and record a deed granting to Plaintiff present joint title to certain real property then owned in fee simple by María Flores. The property in question was the real property and house located in Angeles County.

4. Defendant undertook the engagement and represented that he possesses and would exercise that standard of skill, prudence, and diligence that members of the legal profession commonly possess and exercise.

5. Defendant owed a duty to Plaintiff to exercise said standard of skill, prudence, and diligence by reason of the fact that Plaintiff was the intended beneficiary of the undertaking Defendant agreed to carry out for María Flores.

6. Defendant breached said duty to Plaintiff by failing to timely record and deliver said deed as instructed by María Flores.

7. María Flores died on July 15, 2008, at which time Defendant had not carried out the instructions of María Flores to record and deliver said deed to Plaintiff. Defendant failed to record the grant deed until August 20, 2008, one month after María Flores' death and almost eleven months after the deed was executed and delivered to him.

8. Due to Defendant's negligence and breaches, Plaintiff’s brother Charles Flores was able to challenge Plaintiff's title to the real property and house in a probate proceeding; and Plaintiff was forced to litigate the rights to the ownership of María

Flores' property and house, litigation that would have been avoided but for Defendant's negligence in carrying out the instructions given to him.

9. The Estate of María Flores was probated under the rules of intestate succession, and during the probate proceedings, in which Plaintiff's title to the real property and residence was challenged, the probate court issued a tentative decision stating that the court intended to rule that María Flores did not have the present intent to deliver title to Plaintiff when she delivered the deed to Defendant.

10. In deciding that María Flores did not have the present intent to deliver title to Plaintiff when she delivered the deed to Defendant on October 1, 2007, the probate relied upon Defendant's almost eleven-month delay in properly recording the deed.

11. Attached hereto as Exhibit A and incorporated herein as if fully set forth herein as allegations of this complaint is a true copy of said tentative decision of the probate court. By this reference, Plaintiff avers only that the decision said what it said, and does not adopt the findings or conclusions stated therein.

12. As a result of said tentative decision, Plaintiff was forced to enter into a settlement of her rights in the Estate of María Flores, which settlement was detrimental to Plaintiff and resulted in the loss of the full value of the real property and residence, which Plaintiff would have received if Defendant had not been negligent in performing his duty to Plaintiff.

13. As a consequence of said breach of duty by Defendant, Plaintiff was deprived of the benefit of the real property and residence that María Flores intended should be conveyed to Plaintiff during María Flores's lifetime.

14. As a result, the real property and residence that María Flores intended to have been conveyed to Plaintiff remained in the Estate of María Flores, and, under the rules of intestate succession, the value of the real property and residence was distributed to María Flores's three children in equal shares.

15. But for the Defendant's negligence and breach of duty to Plaintiff, the real property and residence would have been conveyed in its entirety to Plaintiff. Said negligence and breach of duty was the actual and proximate cause of Plaintiff's loss.

16. Plaintiff suffered damages as a proximate result of Defendant's negligence, including:

a. The loss of Plaintiff's right to the entirety of her mother's home; instead of sole ownership of the real property and house, Plaintiff will receive only a one-third share of the value of the property and house, after it is sold;

b. Attorney's fees paid to Defendant; attorney's fees and costs incurred in the probate case; and other general and special damages as allowed under law.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For the value of Plaintiff's loss according to proof.
2. For such other and proper relief as the Court may deem just and proper.

Armond Acri
Attorney for Plaintiff

EXHIBIT A

Tentative Decision

ESTATE OF MARIA FLORES, Deceased.

Charles Flores, as Administrator and Petitioner v. Dalia Flores, Objector

Super.Ct. No. BP052304. March 26, 2009.

The Superior Court, Angeles County

Kathe Henry, Judge:

For purposes of clarity and not out of any disrespect, the Flores will be referred to by their first names.

María Flores (María) died on July 15, 2008. Thereafter, María's son, Charles Flores (Charles), was appointed personal representative of María's estate. Charles has petitioned this court to have decedent's daughter, Dalia Flores (Dalia), transfer to the estate a deed to decedent's home, which allegedly transferred title to Dalia.

Dalia filed objections to the petition. The objections alleged that María executed a deed on October 1, 2007, transferring all interest in the residence to a joint tenancy of herself and Dalia; upon María's death, title would pass to Dalia exclusively; and after executing the deed, María delivered it to Mr. Falk with instructions to have it recorded. The deed was not duly recorded until August 20, 2008, or after María's July 15, 2008 death.

We will describe the conflicting evidence in some detail. It is undisputed that in September and October, 2007, María was ill with gastric cancer and hospitalized. María had surgery on September 17, 2007, and a second one on September 26, 2007. On October 1, 2007, María was in the hospital recovering from surgery.

Testimony of Attorney Falk

On or before October 1, 2007, María called Gary A. Falk, a lawyer who had helped her in the past, and asked him to come to the hospital. María asked that he prepare a “deed as joint tenants.” Mr. Falk agreed to do so. When Mr. Falk talked to María that day, it was the first time he had spoken to her about a deed of any kind.

Mr. Falk did not recall how much of her medical condition María disclosed to him. Mr. Falk did not recall in which hospital they met nor the time of day the meeting occurred. Mr. Falk appeared at the hospital alone. A nurse may have been in the room. María was confined to the bed and “seemed to be in a lot of pain.” But Mr. Falk testified, “She seemed to have all her wits about her.” According to Mr. Falk, she knew who he was and what he was there to do. Mr. Falk did not recall whether he knew she had just had an operation.

Mr. Falk acted as the attorney and notary public in the transaction. María signed the deed and signed the notary book. Mr. Falk testified that after he prepared the deed, he “believed Mrs. Flores was under the belief” that he would record the deed immediately. However, after María signed the deed, he did not file or record the deed:

“Q. Mr. Falk, just to be clear, the decedent asked you to record that deed?

A. Yes, she did.

Q. And she asked you to record that deed on the date of the execution of the documents?

A. Yes.

Q. October 1st, 2007?

A. Yes.

Q. And after you left the hospital at that time, did you ever receive any other instructions from the decedent regarding not recording the deed?

A. No, I did not.”

Mr. Falk testified he did not want to record the deed right away because María was in the hospital. Mr. Falk wanted to talk to her after she got out of the hospital to make sure that her wishes remained the same. Mr. Falk explained that he was “just being overly protective of [his] elderly client and because [he had] seen her in the hospital.” Mr. Falk believed that when clients were hospitalized, they were a little bit more concerned or worried and “may change their minds upon their release.”

“Q. Mr. Falk. If Mrs. Flores asked you to record the deed, why did you wait for over eight months before you did that?

A. I had intended to call her upon her release from the hospital just to make sure that that was - those were still her wishes, and I never did call her.

Q. And so when she called you, she said to you specifically she wanted to make a deed for her daughter, but yet, you didn't just do what she said?

A. Right. I wanted to know what her wishes were. And she said that she wanted her daughter to receive her property once she passed away.

Q. And were you diligent about following her wishes?

A. In terms of seeing that the property was transferred appropriately, I obviously wasn't diligent in recording the deed she had asked me to.”

The first time Mr. Falk thought of recording the deed was when Dalia called him in early June, 2008, and asked him for a copy of the recorded deed. Mr. Falk did not recall whether Dalia said María was in the hospital or deceased. He thought he was aware María's condition had changed for the worse. He did not ask if María was incapacitated nor to speak with her. Mr. Falk did not believe that he spoke with María after she signed the deed on October 1, 2007.

Thereafter, on June 15, 2008, Mr. Falk sent the documents to the county recorder's office to be recorded. The recorder's office did not record the deed because his notary stamp was smudged and illegible. The rejected deed was received in his office on June 22, 2008. He imprinted another stamp, and he sent the deed back for recordation. [The cover letter resubmitting the deed was dated August 1, 2008.] María had died on July 15th.

Testimony of Dalia Flores

Dalia testified that María asked her to call Mr. Falk and ask him to come to the hospital. Dalia telephoned Mr. Falk a day or two before October 1, 2007. Dalia related to Mr. Falk that María wanted a power of attorney and a “joint tenancy will” prepared.

On October 1st María was in pain but “she was herself.” Dalia did not recall whether Mr. Falk was there when she arrived or he came in while she was at the hospital. Dalia did not stay in the room during the entire time Mr. Falk was speaking to María. Dalia walked out and left them alone but returned. Dalia testified she saw María sign the deed or “a paper.” And Dalia heard María instruct Mr. Falk to record the deed. Dalia also heard Mr. Falk say he would record it.

Prior to the meeting with Mr. Falk, María did not disclose to Dalia whom she desired to have title to the residence. Dalia said that she did not tell Mr. Falk whom María wanted to receive the house. Dalia told Mr. Falk that María wanted to talk to him about a power of attorney and the house. On the evening of October 1st, after Mr. Falk left, María told Dalia what she had done and about the deed, with joint title to Dalia. Dalia testified that the first time she saw the deed was when Mr. Falk sent it to her after it had been recorded.

Dalia testified that she lived with María all her life. María lived in the house with her daughters, Dalia and Brenda, and Brenda’s son Donnie. Brenda had suffered a stroke, could not work, and had limited mobility. María paid the mortgage, taxes, and insurance on the house until she died; Dalia paid the mortgage on the subject property commencing on July 28, 2008; Dalia and Brenda paid the taxes; they started paying the taxes in November 2008; and Brenda paid the insurance.

Testimony of Charles Flores

Charles, the administrator of the estate, testified that María went into the hospital September 16, 2007, and was released October 10, 2007. While María was in the hospital, she talked to Charles about the residence. The property initially belonged to both his parents. Because of the bickering between Charles and Dalia, María told him that she would rather sell the property and split the money between all the children. After she was released from the hospital, María never told Charles that she had given a deed or a joint estate to Dalia.

Testimony of Brenda Flores

Brenda Flores testified concerning a discussion in October 2007 with María about the ownership of the house, as follows, “She told me she had signed everything over to Dalia.” María asked Brenda how she felt about it. Brenda testified that since Dalia was the oldest, she had no problem with it. Brenda added, “María knew I still had lots of physical problems, and she didn't want to put that pressure on me.” Brenda also noted that María could not speak in September for about a week after she had surgery. María was under sedation. Brenda knew that María was in a lot of pain.

DISCUSSION

The dispositive issue is whether the deed was delivered with a present intent by the grantor to convey title to the property. Delivery to a third person to be recorded is sufficient delivery to the grantee. However, where the grantor has reserved the right to recall the deed, there is no delivery. The concept of delivery involves more than merely physically handing possession of the deed to the grantee or someone on his behalf. The act of delivery must be accompanied with the intent that the deed shall become presently operative as such, that is, must be accompanied with the intent to presently pass title, even though the right to possession and enjoyment may not accrue until some future time. Delivery or absence of delivery of a deed and intention of the grantor to pass title are questions of fact for the trier of fact to be determined upon all the circumstances surrounding the transaction.

There is no issue of María’s competence or testamentary capacity. Charles, Dalia, and Brenda thought that while María was in the hospital, she understood her condition and circumstances, and was in control of her mental faculties.

The facts and circumstances that occurred at or near the time the deed was executed and given to Mr. Falk, however, are in dispute. Mr. Falk and Dalia testified that María gave instructions that the deed be recorded. However, this evidence was contradicted in material respects. Charles testified María wanted the residence sold with all the children to share equally in the proceeds. Also after allegedly executing the deed, María continued to keep control of the property and did not cede control to Dalia. She paid the mortgage, all taxes and insurance. Dalia paid no part of those until after her mother's death.

As stated, delivery with a present intent to convey title is required for a valid transfer. However, recording of the deed is not a requirement for a valid transfer. Falk's failure to record the deed before María's death is not grounds to invalidate the deed. Nevertheless, the circumstances of the transaction, which include recordation after María's death, are relevant evidence concerning María's intent to make a present transfer of the property. Mr. Falk was so concerned about María's intentions he took no steps to record the deed she allegedly executed because she was hospitalized when she executed the document. Mr. Falk testified that he felt obligated to retain the document and to talk to decedent after she was released from the hospital so that he could make a further determination that she had made a final decision in connection with the deed. Failing to record the deed is circumstantial supporting evidence of Mr. Falk's doubts about María's real intentions concerning the deed. The attorney's delay in recording is significant, relevant evidence in the determination of whether decedent had present intent to convey title of property to her daughter.

Objector Dalia Flores invites the Court to speculate and contends that there would be no issue as to María's intent if Falk had recorded the deed as directed by María on October 1st, or if Falk had discussed the deed with María at any time between October 1st and her death approximately nine months later and then recorded the deed. However, that is not what occurred, and thus is irrelevant.

TENTATIVE DECISION

It is the Court's tentative conclusion that there is sufficient credible evidence to prove that the decedent did not have the intent to deliver the deed to her daughter when she entrusted the deed to her attorney, and that thus the decedent failed to have an immediate present intent to convey the property.

The Court's tentative disposition is to grant the petition and order the Objector to convey the real property back to decedent’s estate.

Kathe Henry,

Judge of the Superior Court

JESSICA RUTZICK

Attorney for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

FOR THE COUNTY OF ANGELES

Case No. 88888

DALIA FLORES, Plaintiff,

vs.

GARY A. FALK, Defendant

DEMURRER TO COMPLAINT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Defendant Gary A. Falk demurs to the complaint on file herein.

Wherefore, Defendant prays that:

1. This demurrer be sustained and Plaintiff take nothing by her complaint.
2. For costs of suit; and
3. For such other and further relief as the Court deems just and proper.

Jessica Rutzick

Attorney for Defendant

Defendant's Memorandum of Points and Authorities in Support of Demurrer

In a probate contest between the plaintiff and the executor of her mother's estate, the probate court issued a tentative ruling in which it refused to uphold a deed to her mother's house. The deed, executed prior to her mother's death, would have granted the house to the plaintiff and excluded her brother's and sister's shares. After giving up her claim in the probate court, plaintiff now sues her mother's attorney, who drafted the deed, because he delayed in recording the deed in order to protect his client's interest and to determine if that was her true intent.

Although in limited circumstances a lawyer retained to provide legal services to a grantor may also have a duty to act with due care for the interests of intended third-party beneficiaries, the lawyer's primary duty is to serve and carry out the client's intentions. Where, as here, there is a question as to the client's intent to favor one adult child over another, the lawyer should not be held accountable. Any other conclusion would place the lawyer in an untenable position of divided loyalty.

Statement of Facts

While hospitalized for surgery during October 2007, María Flores (the widowed mother of three adult children) summoned her lawyer, Gary Falk, to the hospital and asked him to prepare a deed transferring her residence to one of her daughters, Dalia Flores. Falk prepared a joint tenancy deed; María signed the deed. Falk, however, did not send it to the recorder's office until June 2008. The deed was recorded about a month after María died.

In a dispute between María's son, Charles Flores, as the personal representative of María's estate, and Dalia over whether María intended a present grant of the house, Falk testified that although María signed the deed, he chose not to immediately record the deed, because he was "being overly protective of [his] elderly client and because [he had] seen her in the hospital," and he was "just being overly cautious on [his] own."

The probate court issued a tentative ruling, indicating its intention to grant Charles's petition, resolving the conflicts in the evidence against Dalia. The court found the evidence insufficient to prove that María had "an immediate present intent to convey the property" to Dalia, and specifically noted Falk's testimony that he felt obligated to retain the deed until he could talk to María after her release from the hospital.

Dalia filed this action against Falk, grounded on the legal conclusions that Falk owed her a duty as a third-party beneficiary of the services Falk rendered to María; that he was negligent in failing to record the deed promptly; and that his negligence caused Dalia to lose the property in the probate proceeding. This demurrer challenges those legal allegations.

Argument

Where, as Here, a Lawyer Doubts a Client's Intention to Favor a Non-Client, His Primary Duty is to the Client, and the Lawyer Should Not Be Held Accountable to the Non-Client.

Lucas v. Hamm, Col. Sup. Ct. (1961) held that an attorney who assumes preparation of a testamentary document may incur a duty not only to the testator client, but also to intended beneficiaries, and lack of privity alone does not preclude the testamentary beneficiary from maintaining an action against the attorney.

To prevail in these limited circumstances, the plaintiff must sustain the heavy burden of prevailing on seven factors identified by the Columbia Supreme Court in the *Lucas* case. These factors are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him or her, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury, (5) the policy of preventing future harm, (6) whether the recognition of liability to beneficiaries would impose an undue burden on the profession, and (7) the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client.

Weighing the factors is a question of policy for this court alone to resolve, and thus a demurrer is the proper forum for decision. It is not an issue of fact to be left to a jury.

Here we need but mention a few of the factors that are dispositive. For example, the alleged delay in recording the deed was not the cause of Plaintiff’s failure to prevail in the probate court. Rather it was, as found by the probate court, that María Flores did not intend delivery of the deed to plaintiff. There is in effect no causal connection between Falk's failure to record the deed and plaintiff's alleged injury. Thus, factor 4 fails.

Similarly, plaintiff has already had a trial on her right to the property. No policy of preventing future harm (factor 5) is served by giving her a second bite at the apple.

Finally the probate tentative decision and Columbia cases dictate that defendant's only duty was one of undivided loyalty to his client. From the circumstances, Defendant was unsure of his client's true intent, and he chose to protect her interest by deferring recordation of the deed. If looking out for his elderly and ill client could expose him to liability to others, it would place an undue burden on the legal profession (factor 6) and would interfere with an attorney's primary ethical duty to his client (factor 7).

Radovich v. Locke, Col. App. Ct. (1995), held that there can be no liability to potential beneficiaries where the testator's true intent is in question. In *Radovich*, a lawyer prepared a new will for a client naming her husband as a beneficiary but the client died without executing the will. The Court held that as a matter of law the husband could not sue the lawyer for negligent lack of diligence because the “imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent.”

In this case, Falk's duty was to María, and his testimony in the probate proceedings shows that he had that duty in mind when he did not immediately record the deed because he was “being overly protective of [his] elderly client.” Since it is undisputed that Falk questioned his client's intent to deliver the deed, a rule that imposed on Falk an obligation to act in Dalia's best interests would necessarily result in a breach of Mr. Falk's duty to María, a classic example of divided loyalty.

Under these circumstances, Falk did not owe a duty to Dalia, and it follows that Falk's demurrer should be sustained without leave to amend.

JESSICA RUTZICK

Attorney for Defendant

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OSORNIO v. WEINGARTEN

Columbia Court of Appeals (2004)

In *Lucas v. Hamm*, Col. Sup. Ct. (1961), our Supreme Court rejected the traditional rule that an attorney owed no duty to nonclients. The court held that beneficiaries could sue the attorney whose negligent preparation of a will caused them to lose their testamentary rights, where the attorney's engagement was intended to benefit the nonclient, and the imposition of liability would not place an undue burden upon the legal profession.

Our case is one involving a potential extension of *Lucas*. Simona Osornio, a nonclient, was the named executor and sole beneficiary under a will executed in 2001 (2001 Will). Because she was care custodian to the testator, a dependent adult, Osornio was a presumptively disqualified donee under Probate Code section 350. After the probate court held that she could not overcome that presumption and thus the bequest to her failed, Osornio filed this action against Saul Weingarten, the attorney who drafted the will on behalf of the testator, for failing to advise the testator of the presumptive disqualification and steps to cure the defect.

In early 2001 the testator, Dora Ellis, retained Weingarten to prepare a new will that would revoke her prior wills and codicils, and name Osornio as the executor and sole beneficiary under Ellis's new will. Osornio was the intended sole beneficiary of Ellis, and she would have received the entire value of Ellis's estate.

Peggy Williams was the beneficiary under Ellis's prior will (1993 Will). Williams filed a petition to probate the 1993 Will. Osornio objected to the Williams petition and filed a separate petition to probate the 2001 Will. The dispute proceeded to trial in the probate court.

The probate court's conclusion after trial was: "Osornio was a care custodian of a dependent adult, Dora Ellis, in September 2001. The provisions of Probate Code section 350 applied, and Osornio has failed to satisfy her burden of rebutting the presumption of undue influence created by Probate Code section 350." The presumption could have been rebutted had the testator obtained a certificate of independent review by another attorney. Failing that, “the Court finds that the evidence before the Court is not sufficient to overcome the presumption that the will executed by Ms. Ellis on September 19, 2001, leaving all her estate to her caretaker, was the product of undue influence.”

It is further apparent that, at the time Ellis consulted Weingarten in September 2001, he was aware that Osornio was Ellis's care custodian. In the probate proceeding, both Weingarten and his paralegal, Anne Fingold, testified that Osornio accompanied Ellis to Weingarten's office on September 19, 2001. Fingold testified further that “it appeared to me that Ms. Ellis was dependent on her caretaker, Ms. Osornio.”

Osornio's theory of negligence is that Weingarten owed her a duty of care as the testator's intended beneficiary, and that, at the time the will was drawn, Weingarten: (1) failed to advise the testator that her intended beneficiary, Osornio, would be presumptively disqualified unless the testator obtained a certificate of independent review from another attorney, and (2) failed to take appropriate measures to ensure that the testator's wishes were carried out by referring her to counsel to obtain such a certificate.

Weingarten filed a demurrer to the complaint, contending that the complaint failed to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer without leave to amend.

DISCUSSION

In reviewing the propriety of the trial court's sustaining of the demurrer, we, of course, just as the trial court, must accept as true the factual allegations properly pleaded in the complaint.

A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. While negligence is ordinarily a question of fact, the existence of duty is generally one of law. A demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff. Thus, to defeat a demurrer the court looks for facts which, if later proved, would establish a cause of action.

A legal malpractice action is composed of the same elements as any other negligence claim: duty, breach of duty, proximate cause, and damage. Weingarten's demurrer was founded upon the conclusion that Weingarten, as a matter of law, owed no duty to Osornio, a nonclient.

We start with the undisputed proposition that, in Columbia, an attorney's liability for professional negligence does not ordinarily extend beyond the client except in limited circumstances. Indeed, until 1961, Columbia followed the traditional view that an attorney owes a duty of care, and is thus answerable in malpractice, only to the client with whom the attorney stands in privity of contract.

In *Lucas, supra*, the Supreme Court disapproved of the strict privity requirement. The beneficiaries sued the attorney who drafted the will and codicils in a manner that caused the instruments to fail because they ran afoul of statutory restraints on alienation and the rule against perpetuities. The Court held,

> When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests. Only the beneficiaries suffer the real loss. Unless the beneficiary could recover against the attorney in such a case, no one could do so and the social policy of preventing future harm would be frustrated.

The Court held that an attorney's liability to a third person not in privity in a particular case “is a matter of policy and involves the balancing of various factors, among which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the policy of preventing future harm, (6) whether the recognition of liability would impose an undue burden on the profession, and (7) the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client.” (*Lucas, supra*.)

Applying these factors, the Supreme Court concluded that the attorney owed a duty of care to the beneficiary, even in the absence of privity.

In the near half-century since the Supreme Court decided *Lucas*, Columbia courts have considered numerous variations of the attorney's potential liability to nonclients. Some instances have involved an attorney's duty of care in the estate planning context, while others have addressed negligence claims by nonclients in other business settings.

It is against the foregoing backdrop concerning questions of the attorney's duty to nonclients that we now address the question on appeal.

Irrespective of the wording of the complaint, it is readily apparent that Osornio alleged that Weingarten breached a duty of care owed to her: Weingarten negligently failed to advise Ellis that the intended beneficiary under her 2001 Will, Osornio, would be presumptively disqualified because of her relationship as Ellis's care custodian. Under this theory, Weingarten was negligent not only by failing to advise Ellis of the consequences of Section 350; he was also negligent in failing to address Osornio's presumptive disqualification by making arrangements to refer Ellis to independent counsel to advise her and to provide a certificate of independent review.

We must now address whether this pleading sufficiently alleges a legal duty owed by Weingarten to the nonclient, Osornio, by balancing of seven factors considered by the Court in *Lucas*.

1. Transaction Intended to Affect Plaintiff

In the cases finding duties owed to nonclients, the nonclients were the intended beneficiaries of the attorney's work, or were relying on that work, or were to be influenced by it (and the attorney knew or should have known this).

Unquestionably, this factor supports Osornio. Here, there is no doubt that the end and aim of drafting of the 2001 Will was to provide for the passing of Ellis's estate to Osornio.

2. Foreseeability of Harm to Plaintiff

We have no trouble concluding that this factor similarly supports Osornio. It was clearly foreseeable at the time Weingarten drafted the 2001 Will that, if he failed to exercise due care to effectuate the testamentary transfer that Ellis intended upon her death, Osornio would be damaged.

In addition, the 2001 Will was a revocation of Ellis's prior 1993 Will, under which another person, Williams, was beneficiary. Thus a will contest in the probate court was probable. This relevant fact increased the foreseeability of harm to Osornio in the event that there was no certificate of independent review of the 2001 Will. It concomitantly decreased the likelihood that Osornio would be able to meet her heavy burden of proving by clear and convincing evidence that the bequest was not the product of undue influence.

3. Degree of Certainty of Plaintiff's Injury

It is clear that Osornio sustained injury. Although Ellis intended under the 2001 Will that Osornio receive the entire estate, she will receive nothing if she is unable to rebut her presumptive disability under Section 350. Osornio's efforts to rebut the presumption have been unsuccessful. Osornio will sustain the definite injury of being deprived of the estate she would have received, but for her disqualification.

4. Closeness Between Defendant's Conduct and Plaintiff's Injury

We acknowledge that Weingarten's conduct, as alleged in the complaint, does not have the same degree of closeness to Osornio's injury that is found in many of the authorities. This is admittedly not a case, such as *Lucas, supra*, where there are no possible factors that might break the direct causal connection between the attorney's conduct and the nonclient's damage. Here, the facts may ultimately disclose that it would have been unlikely, for a variety of reasons, that Ellis would have obtained a certificate of independent review, even had Weingarten advised her of the importance of seeking counsel to obtain it.

Under at least one scenario, however, Osornio may be able to establish that, but for Weingarten's failure to advise Ellis and refer her to independent counsel to address Osornio's presumptive disqualification, Osornio would not have been damaged.

It suffices to say that we conclude here that the absence of an extreme closeness between conduct and injury, by itself, should not trump a finding of an attorney's duty to a nonclient in a case that, otherwise applying the remaining six factors, warrants it.

5. Policy of Preventing Future Harm

If testamentary beneficiaries who are presumptively disqualified under Section 350, such as Osornio, are deprived of the right to bring suit against the attorney responsible for the failure of the intended bequest, no one would be able to bring such action. The policy of preventing harm would thus be impaired.

The imposition of duty under the circumstances before us would thus promote public policy. It would encourage the competent practice of law by counsel representing testators, trustors, and other clients making donative transfers to persons presumptively disqualified.

6. Extent of Burden on Profession

An important factor we must consider in evaluating Weingarten's potential duty to Osornio under the facts before us is whether the extension of liability here would “impose an undue burden on the profession.”

The existence of statutory limitations on donative transfers to certain classes of people is a matter known to competent estate planning practitioners.

We thus conclude that imposition of duty upon an attorney toward third parties here does not place an undue burden on the profession, particularly when taking into consideration that a contrary conclusion would cause an innocent beneficiary to bear the loss.

7. Interference with the Attorney's Ethical Duties

We find that the imposition of liability here would not result in a situation where the attorney would be faced with conflicting loyalties in representing the client. Imposing liability here does not burden the attorney with concerns that would prevent him from devoting his entire energies to his client's interests. To the contrary, it would encourage attorneys to devote their best professional efforts on behalf of their clients to ensure that transfers of property to particular donees are free from avoidable challenge.

We have balanced the factors that must be considered in evaluating the question of an attorney's potential liability to third parties. As a matter of public policy, we must conclude that Weingarten owed a duty of care to Osornio under the facts as alleged in the complaint.

The judgment is reversed.

RADOVICH v. LOCKE

Columbia Court of Appeals (2005)

The facts material to the issues before us are essentially undisputed. Mio Radovich married Mary Ann Borina (the decedent) in 1967. Shortly before they married, Radovich and Borina signed a form of prenuptial agreement, prepared for Borina by the defendant Law Firm. The agreement stated among other things that each party's property, owned at or acquired after the marriage, should be and remain his or her separate property and that no community property shall exist during the marriage.

In November 1983 Borina executed a will, prepared by the defendant Law Firm, which, after specific gifts to Radovich and others, would give the residue of the estate to two charitable remainder trusts for the ultimate benefit of the Regents of the University of Columbia upon the death of the last to die, of Radovich, Borina's sister, and the sister's husband. Under the trusts, income payments were to be shared among Radovich, the sister, and her husband during their lifetimes.

On June 21, 2001, defendant Locke (an attorney with defendant Law Firm) met with Borina to discuss drafting a new will for her. At the meeting, Locke learned that Borina had been diagnosed as suffering from breast cancer, for which she had received chemotherapy treatments. The purpose of the meeting was to discuss the drafting of a new will under which Radovich was to receive 100% of the testamentary trust income for the rest of his life. Locke did not discuss the new will with Borina at any time after the June 2001 meeting.

Locke declares that "I delivered the proposed new will to Borina on October 8, 2001, for her review and comments. Once this proposed will had been delivered to Borina, it was my understanding that the next move was hers. I could not proceed any further with the preparation of the new will until she communicated to me her comments and whether she was satisfied with its provisions. Moreover, Borina told me she intended to confer with her sister." Locke further declares that Borina "did not communicate with me regarding the draft of the new will prior to her death."

Borina died on December 19, 2001. She had not executed a new will. Ultimately her 1983 will was admitted to probate.

Radovich then brought an action for legal malpractice against Locke and the Law Firm, alleging in his complaint that Locke, individually and as a representative of the Law Firm, had been dilatory and negligent in failing to obtain the decedent's execution of the 2001 draft will. The complaint in the malpractice action alleged that the decedent's estate had been valued at approximately $10 million.

Shortly before trial, Locke and the Law Firm (collectively “Locke”) moved successfully for summary judgment concluding that Locke owed no duty to Radovich. This appeal followed.

Review of summary judgment involves pure matters of law, which we review independently.

Radovich asserts that Locke, with knowledge of Borina’s life-threatening illness, fell short of the professional standard of skill, prudence, and diligence in two specific respects: by permitting three and one-half months to elapse before delivering a draft will to Borina, and by making no effort, in the more than two months between delivery of the draft and Borina's death, to remind Borina of what she needed to do to execute the will or even to find out whether she wished to execute it.

However, the narrow question framed for the trial court, and for us on independent review, is whether Locke's duty to use professional skill, prudence, and diligence extended beyond his client to an individual who would have benefitted had Locke's client executed a will consistent with the draft he submitted to her, but which she never signed. If Locke owed no such duty to Radovich, then Radovich could not recover from Locke for the asserted breach of the duty.

Lucas v. Hamm, Col. Sup. Ct. (1961) is well known for its development of the modern law of the duty of care owed by a party performing a contract to a plaintiff who is not a party to the contract and, in this sense, is not in privity with the contracting party.

The case before us differs from *Lucas v. Hamm* in one significant respect: Borina never signed the will Locke drafted. The crux of *Lucas* was that a will the decedent had signed had been rendered wholly or partially ineffective, at least as to the beneficiaries, by the negligence of the person who had prepared the will. By contrast, the crux of Radovich's claim is that a will potentially beneficial to him had never become effective because of Locke's negligence; Borina had not signed it.

Radovich argues that "every one" of the *Lucas* policy factors supports his position here, citing *Osornio v. Weingarten*, Col. Ct. App. (2004). However, most of the *Lucas* factors by no means as clearly militate in favor of a finding of duty here.

The "extent to which the transaction was intended to affect" Radovich depends to some degree on one's perception of the nature of the transaction. In *Lucas*, the circumstances suggested that the decedent there foresaw a possibility of death within a very short time, within days or even hours, and it may be inferred that he, the decedent there, would need to make and implement a decision without assurance that he would have an opportunity to change his mind. The situation of the decedent in this case was significantly different: although she was aware of her cancer and, inferably, of its lethal potential, no one suggests that in June 2001 she believed her death was so imminent as to be likely to deny her an opportunity to give further thought to her testamentary plan after the will was drafted. Indeed she expressed an intention to discuss the draft with her sister, and it may be inferred that she could reasonably have expected the sister to try to change her mind.

We see both practical and policy reasons for requiring more evidence of commitment than is furnished by a direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. Thus we must, as a policy matter, insist on the clearest manifestation of commitment the circumstances will permit.

By the same token, the "foreseeability of harm" to Radovich, the degree of certainty that he "suffered injury" attributable to Locke's conduct, and the "closeness of the connection" between Locke's conduct and the injury Radovich assertedly suffered, are all significantly less in this case than they would have been in a case, such as *Lucas*, in which a new testamentary document had been signed by the decedent before she died.

On the other hand, the asserted deficiencies in Locke's performance, if proven, arguably should in some manner be sanctioned as a deterrent to "future harm" in similar circumstances. The strongest argument for Radovich's position is that if the duty of care owed by Locke is not extended to Radovich, in the circumstances of record, Locke will be liable to no one and an opportunity to deter such conduct in the future will be lost. Similar arguments were given substantial, if not dispositive, weight in *Lucas*.

Countervailing policy considerations are present in this case. The imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily and would contravene the attorney's primary responsibility, i.e., to ensure that the proposed estate plan effectuates the client's wishes and also to ensure that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. Where, as here, the extension of that duty to a third party could improperly compromise the lawyer’s duty of undivided loyalty by making him the arbiter of a dying client's true intent, the courts simply will not impose that insurmountable burden on the lawyer.

We acknowledge that in the circumstances it would have been professionally appropriate, at least, for Locke to have inquired of the decedent whether she had any questions or wished further assistance in completing the change of testamentary disposition she had discussed with him. But on weighing relevant policy considerations, we conclude that Locke and the Law Firm cannot be held to have owed a duty to Radovich to have done so.

Affirmed.